

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 ANTHONY MICHAEL GIOIOSA, SR.,
4 Plaintiff
5 v.
6 JAMES DZURENDA et al.,
7 Defendants
8

Case No. 2:20-cv-01805-GMN-VCF
SCREENING ORDER

9
10 Plaintiff, who is incarcerated in the custody of the Nevada Department of
11 Corrections ("NDOC"), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983
12 and has filed an application to proceed *in forma pauperis*. (ECF Nos. 1, 1-1). The Court
13 now screens Plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A.

14 **I. IN FORMA PAUPERIS APPLICATION**

15 Plaintiff's application to proceed *in forma pauperis* is granted. (ECF No. 1). Based
16 on the information regarding Plaintiff's financial status, the Court finds that Plaintiff is not
17 able to pay an initial installment payment toward the full filing fee pursuant to 28 U.S.C. §
18 1915. Plaintiff will, however, be required to make monthly payments toward the full
19 \$350.00 filing fee when he has funds available.

20 **II. SCREENING STANDARD**

21 Federal courts must conduct a preliminary screening in any case in which an
22 incarcerated person seeks redress from a governmental entity or officer or employee of
23 a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify
24 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
25 claim upon which relief may be granted, or seek monetary relief from a defendant who is
26 immune from such relief. See *id.* § 1915A(b)(1), (2). *Pro se* pleadings, however, must be
27 liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).
28 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
(1) the violation of a right secured by the Constitution or laws of the United States, and

1 (2) that the alleged violation was committed by a person acting under color of state law.
2 See *West v. Atkins*, 487 U.S. 42, 48 (1988).

3 In addition to the screening requirements under § 1915A, pursuant to the Prison
4 Litigation Reform Act (“PLRA”), a federal court must dismiss an incarcerated person’s
5 claim if “the allegation of poverty is untrue” or if the action “is frivolous or malicious, fails
6 to state a claim on which relief may be granted, or seeks monetary relief against a
7 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a
8 complaint for failure to state a claim upon which relief can be granted is provided for in
9 Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
10 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a
11 court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend
12 the complaint with directions as to curing its deficiencies, unless it is clear from the face
13 of the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
14 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

15 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
16 *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to
17 state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
18 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
19 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
20 allegations of material fact stated in the complaint, and the court construes them in the
21 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
22 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
23 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
24 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
25 must provide more than mere labels and conclusions. *Bell Atl. Corp. v. Twombly*, 550
26 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
27 insufficient. *Id.*

28 Additionally, a reviewing court should “begin by identifying pleadings [allegations]

1 that, because they are no more than mere conclusions, are not entitled to the assumption
2 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide
3 the framework of a complaint, they must be supported with factual allegations.” *Id.* “When
4 there are well-pleaded factual allegations, a court should assume their veracity and then
5 determine whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining
6 whether a complaint states a plausible claim for relief . . . [is] a context-specific task that
7 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

8 Finally, all or part of a complaint filed by an incarcerated person may therefore be
9 dismissed *sua sponte* if that person’s claims lack an arguable basis either in law or in fact.
10 This includes claims based on legal conclusions that are untenable (e.g., claims against
11 defendants who are immune from suit or claims of infringement of a legal interest which
12 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
13 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989);
14 see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

15 **III. SCREENING OF COMPLAINT**

16 The Court dismisses Plaintiff’s complaint in its entirety, with prejudice, as
17 malicious. On September 2, 2020, Plaintiff, proceeding *in forma pauperis*, initiated a
18 federal lawsuit against Defendants James Dzurenda and Dennis Ware in *Gioiosa v.*
19 *Dzurenda et al*, 2:20-cv-01618-APG-DJA.¹ On September 28, 2020, Plaintiff, proceeding
20 *in forma pauperis*, initiated the instant federal lawsuit against Defendants James
21 Dzurenda and Dennis Ware by filing the exact same complaint that he filed in the previous
22 lawsuit. (See 2:20-cv-01805-GMN-VCF at ECF No. 1).

23 The Court notes that duplicative litigation by a plaintiff proceeding *in forma*
24 *pauperis* may be dismissed as malicious under 28 U.S.C. § 1915(e). See *Cato v. United*
25 *States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995) (citing *Bailey v. Johnson*, 846 F.2d 1019,
26 1021 (5th Cir.1988) (holding that repetitious litigation of virtually identical causes of action

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28 ¹ On June 21, 2021, U.S. District Judge Andrew Gordon issued a screening order
in that case granting Plaintiff leave to amend. (See 2:20-cv-01618-APG-DJA at ECF No.
7).

1 is subject to dismissal as malicious)); *Pittman v. Moore*, 980 F.2d 994, 994-95 (5th
2 Cir.1993) (holding that it is malicious for a “pauper” to file a lawsuit that duplicates
3 allegations of another pending federal lawsuit by the same plaintiff). As such, the Court
4 dismisses the complaint, with prejudice, as malicious. The Court further finds that this
5 dismissal constitutes a “strike” under 28 U.S.C. § 1915(g). See 28 U.S.C. § 1915(g)
6 (stating that an action dismissed on grounds that the action is frivolous, malicious, or fails
7 to state a claim constitutes a “strike” under § 1915(g)).

8 **IV. CONCLUSION**

9 It is ordered that Plaintiff's application to proceed *in forma pauperis* (ECF No. 1)
10 without having to prepay the full filing fee is **granted**. Plaintiff will **not** be required to pay
11 an initial installment fee. Nevertheless, the full filing fee will still be due, pursuant to 28
12 U.S.C. § 1915, as amended by the Prison Litigation Reform Act. The movant herein is
13 permitted to maintain this action to conclusion without the necessity of prepayment of fees
14 or costs or the giving of security therefor. This order granting *in forma pauperis* status
15 will not extend to the issuance and/or service of subpoenas at government expense.

16 It is further ordered that, pursuant to 28 U.S.C. § 1915, as amended by the Prison
17 Litigation Reform Act, the Nevada Department of Corrections will forward payments from
18 the account of **Anthony Michael Gioiosa, Sr., #1170052** to the Clerk of the United States
19 District Court, District of Nevada, 20% of the preceding month's deposits (in months that
20 the account exceeds \$10.00) until the full \$350 filing fee has been paid for this action.
21 The Clerk of the Court will send a copy of this order to the Finance Division of the Clerk's
22 Office. The Clerk will send a copy of this order to the attention of **Chief of Inmate**
23 **Services for the Nevada Department of Corrections**, P.O. Box 7011, Carson City, NV
24 89702.

25 It is further ordered that, even if this action is dismissed, or is otherwise
26 unsuccessful, the full filing fee will still be due, pursuant to 28 U.S.C. §1915, as amended
27 by the Prison Litigation Reform Act.

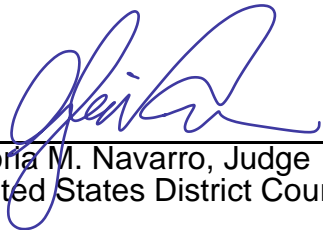
28 It is further ordered that the Clerk of the Court file the complaint (ECF No. 1-1).

1 It is further ordered that the complaint (ECF No. 1-1) is dismissed in its entirety,
2 with prejudice, as malicious. This dismissal constitutes a “strike” under 28 U.S.C. §
3 1915(g).

4 It is further ordered that the Clerk of the Court close the case and enter judgment
5 accordingly.

6 It is further ordered that this Court certifies that any *in forma pauperis* appeal from
7 this order would **not** be taken “in good faith” pursuant to 28 U.S.C. § 1915(a)(3).

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9 DATED THIS 29 day of June 2021.

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13 Gloria M. Navarro, Judge
14 United States District Court
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